

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

11 MICHAEL WILLIAMS,) No. C 04-5069 MMC (PR)
12 Plaintiff,)
13 v.) **ORDER GRANTING
14 JOE McGRATH, et al.,) DEFENDANTS' MOTION TO
15 Defendants.) DISMISS
16 _____) **(Docket No. 26)****

17 On November 30, 2004, plaintiff, a California prisoner proceeding pro se and
18 currently incarcerated at Pelican Bay State Prison ("PBSP"), filed the above-titled civil rights
19 action under 42 U.S.C. § 1983. On May 11, 2005, after reviewing the complaint, the Court
20 found plaintiff had stated cognizable Eighth Amendment claims against several PBSP
21 officials. In the same order, the Court directed defendants to file a dispositive motion or, in
22 the alternative, a notice indicating defendants are of the opinion such a motion is not
23 warranted.

24 On October 11, 2005, defendants filed a motion to dismiss the complaint pursuant to
25 Rule 12(b) of the Federal Rules of Civil Procedure, on the ground plaintiff had failed to
26 exhaust his administrative remedies. See Wyatt v. Terhune, 315 F.3d 1108, 1119 (9th Cir.),
27 cert. denied, 540 U.S. 810 (2003) (providing nonexhaustion claim should be raised in
28 unenumerated Rule 12(b) motion rather than in motion for summary judgment). Plaintiff

1 filed an opposition, and defendants filed a reply. Thereafter, on August 23, 2006, the Court
 2 granted plaintiff leave to file a supplemental opposition to the motion to dismiss, in accord
 3 with Wyatt. See id. at 1120 n.14 (holding court must assure pro se prisoner plaintiff has “fair
 4 notice of his opportunity to develop a record” in opposition to an unenumerated Rule 12(b)
 5 motion). Plaintiff filed two supplemental briefs in support of his opposition to the motion to
 6 dismiss, defendants filed a supplemental reply in response thereto, and plaintiff filed a reply
 7 in response to defendants’ supplemental reply. Accordingly, the motion has been fully
 8 briefed and is ready for decision.

9 FACTUAL BACKGROUND

10 In its order of service, the Court summarized the facts alleged by plaintiff as follows:

11 On February 24, 2004,¹ prison guards extracted two inmates from a cell
 12 near the cell in which plaintiff was housed. In the course of that extraction, the
 13 officers discharged Oleorisin Capasicum (“OC”) spray. Because of the lack of
 14 windows or cross-ventilation, plaintiff’s eyes and lungs began to burn, his nose
 15 discharged mucus, and his skin developed red patches. Defendants Sergeant
 16 Navarro (“Navarro”) and Medical Technical Assistant Munos (“Munos”)
 17 walked by plaintiff’s cell, at which time plaintiff asked them to remove him
 18 from the building because of his asthma and reaction to the OC spray. They
 19 declined to do so. Thereafter, Navarro and defendant Lieutenant Swift
 20 (“Swift”) directed the extraction of another inmate, “Baca,” from a nearby cell,
 during which OC spray was used periodically over the course of 20 to 30
 minutes. There was a sufficient amount of airborne spray that at least ten
 guards wore gas masks, other guards put on gas masks when they entered the
 building, and inmate Baca was rendered unconscious. Plaintiff saw defendant
 Correctional Officer Harkins (“Harkins”) supply gas masks to PBSP personnel.
 For the next 45 minutes, the inmates in that section of the facility were choking
 and coughing. At the time of the extractions, defendant Correctional Officer
 Goodwin² was the control officer and responsible for the inmates. All of said
 defendants were aware of plaintiff’s medical condition.

21 Plaintiff’s asthma inhaler had not been replaced. He was having
 22 difficulty breathing and, along with other inmates, he began to yell for help.
 23 He also complained to at least 15 staff members who passed by his cell to
 participate in Baca’s extraction. Plaintiff experienced nausea, vomiting,
 lightheadedness, and ultimately fainted. Defendant Correctional Officer Pope
 (“Pope”) saw plaintiff at his cell door gagging, and then saw him fall down.
 Plaintiff struck his head, and was taken to the medical clinic, where defendant
 Nurse Aanerud (“Aanerud”) stated that she thought he was malingering.
 25

26 ¹All dates in this order are in 2004, unless otherwise specified.
 27

28 ² Plaintiff identifies this defendant as “Goodwin” in the body of the complaint and as
 “Goodman” in the caption.

1 Defendant Nurse Practitioner Win-Risenhoove (“Win-Risenhoove”) examined
 2 him, cleaned the wound on his head, and ordered Aanerud to dress the wound.
 3 Plaintiff had a bruise on his head, as well as a “golf-ball” size bump, and a cut,
 4 which caused some bleeding. Aanerud did not consider the injury to be
 5 serious, sent plaintiff back to his cell, and denied plaintiff’s request for pain
 6 medication. Because plaintiff could not stand up properly, he was taken back
 7 to his cell in a wheelchair. At approximately 6:00 p.m., plaintiff agreed to be
 8 removed from his cell while the cell and surrounding area were
 9 decontaminated.

10 On February 26, plaintiff complained of headaches and chest pain to
 11 Aanerud. In the ensuing weeks, plaintiff submitted forms requesting medical
 12 care for these symptoms, as well as for nausea, dizziness, and asthma.

13 On March 2, he submitted an inmate grievance regarding his exposure to
 14 the OC spray and resulting medical problems. A hearing on the grievance was
 15 held by Lieutenant Foss, who denied the grievance. Plaintiff’s subsequent
 16 appeals at the higher levels likewise were denied.

17 On April 8, plaintiff was examined by Win-Risenhoove, who renewed
 18 various medications plaintiff had been receiving. Over the next ten days,
 19 plaintiff submitted more forms requesting medical care for ongoing asthma
 20 problems. On April 22, Win-Risenhoove examined plaintiff again, renewed his
 21 asthma medications, and scheduled a follow-up appointment for June 4.
 22 During the month of May, plaintiff continued to submit forms requesting
 23 medical care for his asthma, and was told by defendant Registered Nurse
 24 Garrett (“Garrett”) that he would be seen. On June 1, Win-Risenhoove saw
 25 plaintiff again, and she again renewed his medication. On August 19, plaintiff
 26 requested that his medications be renewed, and, at his visit with Win-
 27 Risenhoove on August 24, his medications were renewed.

28 (See Order of Service, filed May 11, 2005, at 1:20-3:14.)

DISCUSSION

A. Motion to Dismiss

1. Standard of Review

21 Nonexhaustion under § 1997e(a) is an affirmative defense; defendants have the
 22 burden of raising and proving the absence of exhaustion. Wyatt v. Terhune, 315 F.3d 1108,
 23 1119 (9th Cir. 2003). A nonexhaustion defense should be raised in an unenumerated Rule
 24 12(b) motion. Id. In deciding such a motion, the district court may look beyond the
 25 pleadings and decide disputed issues of fact. Id. at 1119-20.³ If the court concludes the

26 ³If the court looks beyond the pleadings in deciding an unenumerated motion to
 27 dismiss for failure to exhaust, the court must give the prisoner fair notice of his opportunity
 28 to develop a record. Id. at 1120 n.14. As noted above, plaintiff was given such notice by the
 Court on August 23, 2006.

1 prisoner has not exhausted nonjudicial remedies, the proper remedy is dismissal of the
 2 complaint without prejudice. Id. at 1120.

3 2. The Exhaustion Requirement

4 The Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321
 5 (1996) (“PLRA”) provides: “No action shall be brought with respect to prison conditions
 6 under [42 U.S.C. § 1983], or any other Federal law, by a prisoner confined in any jail, prison,
 7 or other correctional facility until such administrative remedies as are available are
 8 exhausted.” 42 U.S.C. § 1997e(a). Exhaustion is mandatory and not left to the discretion of
 9 the district court. Woodford v. Ngo, 126 S. Ct. 2378, 2382 (2006). Exhaustion is a
 10 prerequisite to all prisoner lawsuits concerning prison life, whether such actions involve
 11 general conditions or particular episodes, whether they allege excessive force or some other
 12 wrong, and even if they seek relief not available in grievance proceedings, such as money
 13 damages. Porter v. Nussle, 534 U.S. 516, 524 (2002). The exhaustion requirement requires
 14 “proper exhaustion” of all available administrative remedies. Woodford, 126 S. Ct. at 2387.

15 The State of California provides its prisoners and parolees the right to appeal
 16 administratively “any departmental decision, action, condition or policy perceived by those
 17 individuals as adversely affecting their welfare.” Cal. Code Regs. tit. 15, § 3084.1(a). In
 18 order to exhaust available administrative remedies within this system, a prisoner must
 19 proceed through several levels of appeal: (1) informal review, (2) first formal written appeal
 20 on a CDC 602 inmate appeal form, (3) second formal level appeal to the institution head or
 21 designee, and (4) third formal level appeal to the Director of the California Department of
 22 Corrections and Rehabilitation (“Director”). See Barry v Ratelle, 985 F. Supp 1235, 1237
 23 (S.D. Cal. 1997) (citing Cal. Code Regs. tit. 15, § 3084.5). A final decision from the
 24 Director’s level of review satisfies the exhaustion requirement under § 1997e(a). See id. at
 25 1237-38.

26 3. Analysis

27 In his complaint, plaintiff makes the following allegations regarding his exhaustion of
 28 administrative remedies. Plaintiff’s allegations are supported by documentation attached to

1 his complaint.

2 On March 2, 2004, plaintiff submitted an appeal at the informal level of review,
 3 complaining about his exposure to OC spray during the February 24, 2004 cell extraction,
 4 and his resulting medical problems. The action requested by plaintiff in the appeal was for
 5 prison officials to determine, before they used OC spray to accomplish a cell extraction,
 6 whether the prisoner being extracted, or prisoners housed in the same cell unit as the prisoner
 7 being extracted, suffered from asthma, and, if so, that those prisoners be offered the
 8 opportunity to leave the area before the extraction took place. (Compl. ¶ 55 & Ex. E at 1.)
 9 Review of plaintiff's appeal at the informal level was bypassed pursuant to prison
 10 procedures, and the appeal was forwarded directly to the first formal level of review
 11 (hereinafter referred to as plaintiff's "first-level" appeal). (Compl. ¶ 57 & Ex. E at 4-5.) On
 12 approximately April 20, 2004, plaintiff received the response to his first-level appeal,
 13 (Compl. ¶ 64), which was a denial. (Compl. Ex. E at 6-7.)

14 On April 22, 2004, plaintiff submitted a second-level appeal. (Compl. ¶ 64.) On
 15 May 25, 2004, that appeal was denied. (Compl. ¶ 67 & Ex. E at 10.)

16 On May 26, 2004, plaintiff submitted a third-level appeal to the Director's Level of
 17 Review. (Compl. ¶ 67.) On July 10, 2004, N. Grannis ("Grannis"), Chief of the Inmate
 18 Appeals Branch, returned plaintiff's appeal to him because it was missing the "CDC 7219,
 19 Report of Injury," and because plaintiff had not included copies of the incident reports
 20 discussed in the response to plaintiff's first-level appeal. (Compl. ¶ 69 & Ex. E at 12.) On
 21 July 14, 2004, plaintiff submitted a request to "Dr. Risenhoove or R.N." for a copy of the
 22 "Report of Injury" so that he could complete the appeals process. (Compl. ¶ 69 & Ex. E at
 23 13.) Approximately two weeks later, plaintiff resubmitted his third-level appeal, along with
 24 the "Report of Injury." (Compl. ¶ 69.)

25 On September 7, 2004, Grannis returned plaintiff's appeal to him again, because it
 26 was missing "the complete CDC 837, Incident Report (007-04-02-0152, 007-04-02-0153)." (Compl. ¶ 73 & Ex. E at 16.) Grannis informed plaintiff that plaintiff's assigned counselor,
 27 or the Appeals Coordinator, or plaintiff's parole agent could answer any questions plaintiff

1 might have about the appeals process. (*Id.*)

2 On September 12, 2004, plaintiff submitted requests to both his assigned counselor, T.
 3 Cook (“Cook”), and the Appeals Coordinator, M. Nimrod (“Nimrod”), asking for copies of
 4 the relevant incident reports so he could complete the appeals process. (Compl. ¶ 73 & Ex. E
 5 at 17-18.) On September 13, 2004, Nimrod told plaintiff that plaintiff needed to ask his
 6 counselor to look in plaintiff’s file for the reports. (Compl. ¶ 73 n.10 & Ex. E at 18.) On
 7 September 23, 2004, Cook responded to plaintiff’s request as follows:

8 These 837’s are not in your c-file as they were for another incident. Appeals
 9 will get access to these. You cannot get copies.
 10 (Compl. Ex. E at 17.)

11 Plaintiff did not resubmit his third-level appeal or initiate any other appeals regarding
 12 the claims at issue in the instant action.

13 Defendants contend plaintiff did not exhaust his administrative remedies because he
 14 never received a third-level decision on his appeal. Plaintiff argues he did exhaust his
 15 administrative remedies, for the following reasons: a third-level decision should have been
 16 issued but was not, in violation of regulatory time limits; plaintiff was precluded from
 17 proceeding further in the appeals process due to his inability to obtain access to the incident
 18 reports requested by the third-level reviewer; and, defendants had adequate notice of the
 19 claims against them before plaintiff filed suit. The Court addresses the parties’ respective
 20 arguments below.

21 a. Regulatory Time Limits

22 California’s regulations pertaining to the inmate appeals process contain time limits
 23 for submitting or reviewing appeals. See Cal. Code Regs. tit. 15, § 3084.6. With certain
 24 exceptions, third-level appeals must be responded to and returned to the appellant within
 25 sixty working days from the date the appeal is received. See id. § 3084.6(a), (b)(4)-(5).

26 Here, plaintiff contends the sixty-day period for responding to his third-level appeal
 27 was exceeded when, on September 7, 2004, Grannis returned plaintiff’s third-level appeal to
 28 him for the second time, telling plaintiff he still needed to submit additional documentation.

1 Plaintiff argues the sixty-day time limit was exceeded with respect to both his initial third-
 2 level appeal and his resubmitted third-level appeal.

3 There is some authority for the proposition that the exhaustion requirement may be
 4 satisfied if a prisoner files an inmate appeal and receives no response within the time allotted
 5 for a response under appeal procedures. See, e.g., Gregory v. PHS, Inc., No. Civ. A. 00-467-
 6 SLR, 2001 WL 1182779, *3 (D. Del. Sept. 21, 2001) (holding prisoner satisfied exhaustion
 7 requirement where defendants conceded he had filed grievance and there had been no
 8 response thereto). In the instant case, however, plaintiff's third-level appeals were responded
 9 to within the regulatory time limits. Plaintiff submitted his first third-level appeal on May
 10 26, 2004. Within sixty days, on July 10, 2004, Grannis responded to the appeal by returning
 11 it to plaintiff as incomplete. Plaintiff resubmitted his third-level appeal approximately two
 12 weeks after July 14, 2004.⁴ Within sixty days, on September 7, 2004, Grannis responded to
 13 the appeal by again returning it to plaintiff as incomplete.

14 Accordingly, the Court finds no support for plaintiff's argument he exhausted his
 15 administrative remedies due to defendants' failure to respond to his third-level appeals within
 16 regulatory time limits.

17 b. Proper Exhaustion

18 Plaintiff argues he exhausted his administrative remedies on the date he resubmitted
 19 his third-level appeal because no further administrative remedies thereafter remained
 20 available to him. Specifically, he maintains that after he was told by his counselor he could
 21 not have access to the incident reports Grannis was requiring him to submit, there was
 22 nothing further he could do to complete his appeal; accordingly, plaintiff maintains, Grannis
 23 should have independently obtained the reports and reviewed the third-level appeal.

24 Defendants argue plaintiff did not properly exhaust his administrative remedies. In
 25 particular, defendants argue, plaintiff did not comply with the procedural rule requiring him
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27 ⁴Plaintiff does not provide the exact date he resubmitted his appeal, but states in his
 28 complaint that it was approximately two weeks after July 14, 2004, the date he requested a
 "Report of Injury." (Compl. ¶ 69.)

1 to submit the incident reports with his third-level appeal, because two avenues of compliance
2 remained available after plaintiff's counselor and the Appeals Coordinator failed to provide
3 him with those reports. First, defendants argue, plaintiff could have resubmitted his appeal to
4 the third level after he learned he could not have access to the required incident reports, and
5 explained therein to Grannis that he had followed Grannis's advice to ask his counselor and
6 the Appeals Coordinator for assistance, but that he still could not get copies of the incident
7 reports. Second, defendants argue, plaintiff could have initiated a new appeal requesting the
8 incident reports.

9 In response to defendants' first contention, plaintiff argues it would have been
10 fruitless for him to resubmit his appeal without the incident reports, because Grannis had
11 previously refused to consider the appeal if it did not include the incident reports. Plaintiff
12 also argues that if Grannis would have agreed to consider the resubmitted appeal without the
13 incident reports, such agreement would have shown the documents were not necessary for
14 determination of the appeal, and, if that were the case, plaintiff's submission of the third-
15 level appeal without the incident reports should have satisfied the exhaustion requirement.

16 In response to defendants' second contention, plaintiff argues he could not have
17 initiated a new appeal requesting the incident reports, because such an appeal would have
18 been deemed a duplicative appeal on the same matter, the submission of which is prohibited
19 by appeal regulations. See Cal. Code Regs. tit. 15 § 3084.3(c)(2). Plaintiff further argues his
20 requesting the incident reports from the Appeals Coordinator would have been pointless,
21 because the Appeals Coordinator had denied plaintiff's earlier request for the incident
22 reports.

23 The Supreme Court has held the PLRA's exhaustion requirement cannot be satisfied
24 "by filing an untimely or otherwise procedurally defective administrative grievance or
25 appeal." Woodford, 126 S. Ct. at 2382. Rather, the exhaustion requirement requires "proper
26 exhaustion" of available administrative remedies. Id. at 2387. "Proper exhaustion demands
27 compliance with an agency's deadlines and other critical procedural rules because no
28 adjudicative system can function effectively without imposing some orderly structure on the

1 course of its proceedings.” Id. at 2386 (footnote omitted).

2 In the instant case, the third-level appeal plaintiff resubmitted was procedurally
 3 defective because it did not include required documentation. The Court finds unpersuasive
 4 plaintiff’s contentions that he could not cure the deficiency and submit a perfected third-level
 5 appeal. Defendants’ suggested options for plaintiff’s satisfaction of the procedural
 6 requirement are both logical and reasonable, and are not prohibited by appeals regulations.
 7 Indeed, plaintiff’s assigned counsel expressly suggested to plaintiff that “Appeals could get
 8 access to” the requisite reports if needed. (See Compl. E at 17.) By contrast, plaintiff’s
 9 objections are based on speculation without evidentiary support. Accordingly, the Court
 10 concludes plaintiff did not properly exhaust his available administrative remedies.

11 c. Notice

12 Lastly, plaintiff argues his administrative remedies are exhausted because defendants
 13 had adequate notice of the claims against them before plaintiff filed suit. The Supreme Court
 14 has made clear, however, that the primary purposes of the exhaustion requirement extend
 15 well beyond that of providing notice of possible legal action to potential defendants. See
 16 Jones v. Bock, 127 S. Ct. 910, 923 (2007) (discussing benefits of exhaustion requirement;
 17 finding promotion of early notice to those who might later be sued is not “one of the leading
 18 purposes of the exhaustion requirement”). As the Supreme Court observed in Jones:

19 We have identified the benefits of exhaustion to include allowing a prison to
 20 address complaints about the program it administers before being subjected to
 21 suit, reducing litigation to the extent complaints are satisfactorily resolved, and
 improving litigation that does occur by leading to the preparation of a useful
 record.

22 Id. (citing Woodford, 126 S. Ct. at 2378; Porter v. Nussle, 534 U.S. at 524-25.)

23 In the instant matter, plaintiff’s failure to exhaust his administrative remedies through
 24 the third level of review deprived Grannis – the appeals reviewer with the highest level of
 25 authority – of the opportunity to respond to plaintiff’s claims and remedy the situation, and
 26 foreclosed the development of an administrative record clarifying the contours of the dispute.
 27 See Porter, 534 U.S. at 525. Consequently, even if defendants were put on notice of
 28 plaintiff’s claims against them, the exhaustion requirement was not satisfied as a result

1 thereof.

2 d. Summary

3 As discussed above, the Court finds defendants did not fail to respond to plaintiff's
4 third-level appeal within regulatory time limits, plaintiff did not properly exhaust his
5 administrative remedies, and any notice defendants had of plaintiff's claims against them did
6 not satisfy the exhaustion requirement. Accordingly, the Court will grant defendants' motion
7 to dismiss the complaint.

8 **CONCLUSION**

9 For the foregoing reasons, defendant's motion to dismiss the complaint is hereby
10 GRANTED, and the above-titled action is hereby DISMISSED without prejudice to
11 plaintiff's refiling his claims after all available administrative remedies have been exhausted.

12 This order terminates Docket No. 26.

13 The Clerk shall close the file.

14 **IT IS SO ORDERED.**

15 DATED: October 12, 2007

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18 MAKINE M. CHESNEY
19 United States District Judge

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